In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, et al.,

Appellants,

vs.

UNITED AIR LINES, INC., CATALINA AIR TRANSPORT and CIVIL AERONAUTICS BOARD,

Appellees.

Appeal from the United States District Court for the Northern District of California.

BRIEF OF THE APPELLANTS.

EVERETT C. MCKEAGE,
Chief Counsel,
J. THOMASON PHELPS,
Senior Counsel,
WILSON E. CLEIA,
514 State Building, San Francisco 2, California,
Counsel for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

INDEX

Citations

Cases

Statutes

Miscellaneous

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, et al.,

Appellants,

vs.

UNITED AIR LINES, INC., CATALINA AIR TRANSPORT and CIVIL AERONAUTICS BOARD,

Appellees.

Appeal from the United States District Court for the Northern District of California.

BRIEF OF THE APPELLANTS.

OPINION BELOW.

The opinion of the United States District Court (R. 46-50) is reported at 109 F. Supp. 13.

JURISDICTION.

The judgment of the United States District Court was entered January 28, 1953 (R. 65-67). The order denying motion for a new trial was filed February 20, 1953 (R. 104). The petition for appeal was filed March 27, 1953 (R. 105) and the order allowing appeal was issued March 27, 1953 (R. 106). An order postponing jurisdiction was issued by this Court June 15, 1953 (R. 265). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 28 U.S.C. 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *Rorick v. Board of Com'rs. of Everglades Drainage District*, 307 U. S. 208, 83 L. Ed. 1242; *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16, 78 L. Ed. 1088; *Palmetto Fire Insurance Co. v. Conn.*, 272 U. S. 295, 305, 71 L. Ed. 243, 247; *Brucker v. Fisher*, 49 F. 2d 759.

QUESTION PRESENTED.

Where the Secretary of the appellant California Public Utilities Commission has by letters instructed United Air Lines, Inc., to file tariffs covering its service between Los Angeles and Long Beach on the mainland of California, on the one hand, and Avalon on Santa Catalina Island, on the other, and where the Chief Counsel for said Commission has testified that, if the facts remain the same, in a formal investigatory proceeding proposed to be instituted before said Commission because of United's refusal to file such tariffs he will advise said Commission it has jurisdiction to establish rates covering such service, are

United and Catalina Air Transport and the Civil Aeronautics Board entitled (1) to a declaratory judgment issued by a Three-Judge Federal District Court that the Civil Aeronautics Board has exclusive jurisdiction over said air carriers in their operations over such route, and that said Commission and its members and legal advisers have no jurisdiction or power of regulation over the same, and (2) to an injunction issued by a Three-Judge Federal District Court restraining said Commission and its members, employees, agents, and attorneys from in any manner interfering with such declared jurisdiction of the Civil Aeronautics Board or from in any way controlling or regulating said route?

All the points raised in the assignment of errors are also presented. The Question stated above sets forth the major issue.

STATUTES INVOLVED.

The following statutes are involved and are set forth in Appendix A hereto:

Section 20 and the first sentence of the second paragraph of Section 22 of Article XII and a portion of Section 1 of Article XXI of the California Constitution; portion of Sections 170 and 171 of the California Government Code, Sections 1701 through 1706, 1731, 1756 through 1767, and 2107 of the California Public Utilities Code (formerly Sections 53, 60, 61, 62, 64, 65, 66 (first and second sentences), 67, 68, 69, and 76(a) of the Public Utilities Act); Sections 1331, 1337, 1342, 2201, and 2281 of Title 28, United

States Code (62 Stats. 930, 931, 932, 964 as amended by 63 Stats. 105, and 968); Sections 1(2), 1(10), 1(21), 403, 404(a) and 404(b) of the Civil Aeronautics Act of 1938 (52 Stats. 977, 992, and 993, as amended), (49 U.S.C.A. 401(2), 401(10), 401(21), 483, 484(a), and 484(b), and Section 2(a)(2) and Section 4 of Chapter 65, Public Laws 31, 83rd Congress, the Submerged Lands Act.)

STATEMENT.

The appellee Catalina Air Transport, (formerly Wilmington-Catalina Airline, Ltd.), is a California corporation which on October 13, 1939, obtained a certificate of public convenience and necessity from the Civil Aeronautics Authority (now Civil Aeronautics Board) to operate as an air carrier between Wilmington on the mainland of California and Avalon on Santa Catalina Island. *Wilmington-Catalina Air, Grandfather Certificate,* 1 C.A.A. 431, (R. 35 and Plaintiffs' Ex. No. 3).

On July 22, 1941, the Civil Aeronautics Board extended the route of Wilmington-Catalina Airline, Ltd., to Los Angeles, authorizing the carrier to conduct operations between Los Angeles and Avalon via the intermediate point of Wilmington. This same order reflected the change of the carrier's name to Catalina Air Transport. *Catalina Air, Service to Santa Catalina Island,* 2 C.A.B. 798. (R. 35 and Plaintiffs' Ex. No. 3).

On June 3, 1946, the Civil Aeronautics Board approved an operating contract between appellee United Air Lines,

Inc., and Catalina Air Transport, dated March 7, 1946, under which United agreed to perform and discharge all of the obligations of Catalina Air Transport under the latter's certificate of public convenience and necessity. *United Air Lines, Operation of Catalina Air Transport*, 6 C.A.B. 1041. (R. 35 and Plaintiffs' Ex. No. 1).

None of the rates established by Catalina Air Transport or United Air Lines applicable to said route were ever filed with or approved by the appellant Commission (R. 36).

In the year 1951 there was an exchange of correspondence over the question of the jurisdiction of appellant Commission and the duty of United to file its tariffs with said Commission. Letters were exchanged between representatives of United Air Lines, Inc., and the Public Utilities Commission, said letters being dated, respectively, August 6, 1951; September 10, 1951; September 20, 1951; October 11, 1951; November 6, 1951; November 30, 1951; December 5, 1951; and December 27, 1951. Copies of said letters are attached hereto as Appendix B, and made a part hereof. (R. 37-46).

The appellant Commission now claims and asserts and from time to time in the past has claimed and asserted that the rates, fares and charges covering said operations, to the extent that such operations are not a part of interstate, foreign or overseas commerce as defined in Section 1(21) of the Civil Aeronautics Act of 1938 (59 U.S.C.A. 401(21)), i.e., to the extent such operations involve carriage of persons and property other than U.S. mail only

between points on the mainland of California and Santa Catalina Island, are entirely under the control and regulation of said appellant Commission, and that pursuant to the first sentence of the second paragraph of Section 22 of the California Constitution and Sections 1701 through 1706 of the California Public Utilities Code said appellant Commission has jurisdiction to establish such rates, fares and charges by requiring appellee air carriers to file tariffs with the appellant Commission (R. 36-46).

On February 27, 1952, a conference was held at which Mr. Treadwell and Mr. Laughlin, attorneys for appellee air carriers, and Mr. McKeage and Mr. Cline, attorneys for appellants, were present. Mr. Treadwell testified that at this conference Everett C. McKeage, Chief Counsel for appellant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission (R. 169-170). The findings proposed by appellee air carriers included a finding of fact that such advice had been so given. Appellants requested that such proposed finding be stricken on the ground that although the finding is supported by testimony of Mr. Treadwell it is not supported by the preponderance of the evidence (R. 51). The statements of counsel for appellants and the testimony of Mr. McKeage show that there was and is no intention on the part of the appellants to institute penalty actions against United by reason of its refusal to file tariffs covering its operations between Los Angeles-Long Beach and Avalon until after the jurisdictional question is finally settled and that they do not intend then to seek

any penalties except those which accrue after a contumacious refusal on the part of United to comply with a final order of the appellant Public Utilities Commission (R. 177-179, 182, 185-186, 197-198).

In this connection line 5 through line 27 on page 197 of the Record reads as follows:

> "Mr. Phelps. Q. I shall just ask the Judge [Witness McKeage] to describe what the position of the Commission, with respect to this Catalina operation, was prior to the bringing of this suit and what it is now.
>
> Mr. Treadwell. We object to that, your Honor, • • •
>
> Judge Orr. The objection is overruled.
>
> A. [Witness McKeage]. The intention—I can speak for myself, in the statutory duty that I perform, there was no intention on my part to bring penalty actions against this air carrier in connection with this Catalina operation. There was no intention on the part of the Commission to do so either. The only intention that was ever expressed was that if these rates were not filed that an order of investigation would be instituted where the question of jurisdiction would be determined in the orderly course of due process of law.
>
> We have never changed our position. That was our intent then. That is our intent now."

Furthermore, it is a matter of record that the action was not filed by appellee air carriers in the Federal District Court until June 25, 1952, almost four months after the conference of February 27, 1952 (R. 1). This would certainly indicate an absence of pressure on United rather than the threat of a penalty of $2,000 per day (R. 200).

The Three-Judge District Court struck the following from appellees' proposed finding 10 in adopting it as their own (R. 60 and Statement as to Jurisdiction 30):

> "• • • Subsequently, on February 27, 1952, the defendant Everett C. McKeage, Chief Counsel for the appellant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission."

On June 25, 1952, appellee air carriers filed their complaint in the United States District Court seeking declaratory relief and an injunction against appellants. Appellees' principal claim for relief is based on the allegation that appellants claim and assert that appellee United in failing to file its tariffs with appellant Commission has violated Section 2107 of the Public Utilities Code and that United has become liable for penalties in the sum of $2,000 per day for every such violation; that said Commission has threatened to bring suit to recover such claimed penalties unless said tariffs on the route in question are filed with said Commission. Appellee air carriers claim that such penalties are unconstitutional under the Fourteenth Amendment of the Federal Constitution and that appellant Commission has no authority to compel said appellees to file tariffs covering operations over the route in question because exclusive jurisdiction over such route is vested in the Civil Aeronautics Board under the Civil Aeronautics Act (R. 1-8 and 10-11).

The Civil Aeronautics Board, as intervenor, filed a complaint in this proceeding in which it claims that it has

exclusive jurisdiction over the operations in question under the terms of the Civil Aeronautics Act (R. 22-26).

The Three-Judge District Court was convened because appellee air carriers claim that the penalty provisions of Section 2107 of the California Public Utilities Code are in violation of the Constitution of the United States (R. 13). The District Court did not reach nor decide the question presented as to the constitutionality of the penalty provisions, but stated that if the cause required the resolution of no other federal issue, obviously the court could dissolve itself (R. 48 and 61). It did, however, conclude that a substantial question would have been presented as to the constitutionality of the penalty provision, if reached (R. 62).

The District Court found that the statutes of the State of California provide for penalties up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the appellant Public Utilities Commission, and that the refusal of United heretofore to comply with the directives of the appellant Commission to file tariffs, and any refusal to comply with any future such directive, has subjected and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. The District Court further found that apart from these risks, United is confronted with the necessity of incurring the expenditures (in excess of $3,000) incident to defending a proceeding certain to be

instituted before the appellant Commission unless this Court resolves the controversy presented (R. 60-61).

The District Court found that Santa Catalina Island is an island located in the Pacific Ocean, and is a part of the State of California. The distance between the shorelines of the island and of the mainland of California is thirty miles (R. 36 and 58).

The District Court concluded that the intervening waters between the three-mile marginal belts along the coastline of the mainland of the State of California, and surrounding Santa Catalina Island, are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California (R. 63). The District Court further concluded that appellee air carriers' operations between Santa Catalina Island and the mainland of the State of California constitute interstate air transportation as defined by the Civil Aeronautics Act of 1938, and the powers conferred upon and exercised by the Civil Aeronautics Board leave no room for State regulation of these operations (R. 63-64).

On January 28, 1953, the Three-Judge District Court (1) entered a declaratory judgment against appellants decreeing that the Civil Aeronautics Board has exclusive jurisdiction over appellee air carriers in their operations over the route between the mainland of California and Santa Catalina Island, and that the Public Utilities Commission of the State of California and its members and legal advisers, appellants herein, have no jurisdiction or

power of regulation over the same, and (2) issued an injunction permanently restraining the appellant Commission and its members, employees, agents, and attorneys from in any manner interfering with such paramount jurisdiction of the Civil Aeronautics Board or from in any way controlling or regulating said route (R. 65-67).

The motion for new trial filed by appellants February 6, 1953, was heard February 19, 1953, and was denied February 20, 1953 (R. 68-80, 237-262, 104).

The case is now before this Court on direct appeal.

SPECIFICATION OF ERRORS.

The appellants rely upon and urge the following assigned errors in their appeal from the final judgment of the Three-Judge District Court.

The Three-Judge District Court erred:

1. In finding that aircraft flying between Avalon and Wilmington were required to fly over approximately 24 miles of water not within the boundaries of the State of California.

2. In finding that the tariffs and operations of Wilmington-Catalina Airlines, Ltd., and its successor Catalina Air Transport, and of United Air Lines have been and are being conducted under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board.

3. In finding that the statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by

carriers without effective tariffs being on file with the appellant Commission and in finding that appellants in the past have asserted that these statutory penalties are applicable to air carriers, and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including appellee United.

4. In finding that the refusal of the appellee United to comply with directives of the appellant Commission to file tariffs, and any refusal to comply with any future such directive, has subjected and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for recovery of penalties.

5. In concluding that the District Court has jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1337, and 28 U.S.C. 2201.

6. In concluding that the Civil Aeronautics Board is entitled to seek and obtain a ruling as to its powers and jurisdiction as an intervenor in this case, and to obtain declaratory and injunctive relief against any interference by the appellants with its jurisdiction.

7. In concluding that the appellees raised a substantial Federal question concerning the constitutionality of the penalty provisions contained in Section 2107 of the California Public Utilities Code and that this Three-Judge District Court was properly convened.

8. In concluding that the institution of an investigation proceeding before appellant Commission would subject

appellee air carriers and possibly the public to irreparable injury and would constitute a burden on interstate commerce and an interference with the jurisdiction of the Civil Aeronautics Board.

9. In concluding that the threat of institution of an investigation proceeding, the risks and expenditures to which appellee air carriers may be subjected as a result of possible penalty actions, and the actual controversy which exists between the parties are such as to entitle the appellees to declaratory relief and injunctive relief.

10. In concluding that appellees have no plain, speedy, and efficient remedy in the Courts of the State of California, or otherwise, than by this action.

11. In concluding that the matter in issue concerns the reach of a Federal statute which conflicts with the claims of the appellants regarding state law.

12. In concluding that this Three-Judge District Court should decide the issues tendered irrespective of the existence or adequacy of any state court remedies.

13. In concluding and holding that the intervening waters between the 3-mile marginal belts along the coast line of the mainland of the State of California and surrounding Santa Catalina Island are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California.

14. In concluding that the Congress through the adoption of the Civil Aeronautics Act of 1938 has declared

therein that all common carrier transportation by aircraft between places in the same State when that transportation involves passage through or over territory or waters outside the State constitutes interstate air transportation.

15. In concluding that appellee air carriers' operations between Santa Catalina Island and the mainland of the State of California constitute interstate air transportation as defined by the Civil Aeronautics Act of 1938, and that the powers conferred upon and exercised by the Civil Aeronautics Board leave no room for State regulation of these operations.

16. In concluding that the appellees are entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the appellee air carriers in their operations between the mainland of California and Santa Catalina Island, and permanently forbidding and enjoining appellants from, in any manner, interfering with such exclusive jurisdiction.

17. In ordering, adjudging, and decreeing that the Civil Aeronautics Board has exclusive jurisdiction over the appellee air carriers in their operations over the route described in the complaint, and the appellants have no jurisdiction or power of regulation over the same.

18. In permanently prohibiting and enjoining appellants and their employees, agents, and attorneys, and all persons claiming by, through or under them, from in any manner interfering with the exclusive jurisdiction of the Civil Aeronautics Board over the appellee air carriers in their

operations over the route described in the complaint, or from in any way controlling or regulating said route.

19. In failing to find and conclude that no actual case or controversy such as will entitle appellees to the relief requested in the Federal District Court exists.

20. In failing to find and conclude that appellees are subject to no threat of irreparable injury, which will entitle them to the relief requested in the Federal District Court.

21. In failing to find and conclude that appellees have failed to raise a substantial Federal question concerning the constitutionality of the penalty provisions contained in Section 2107 of the California Public Utilities Code and in failing to dissolve the Three-Judge District Court because of appellees' failure to raise such substantial Federal constitutional question.

22. In failing to find and conclude that the administrative processes of appellant Commission and the administrative remedies available to appellees have not been exhausted and, therefore, appellees are not entitled to the relief requested in their respective complaints, and that said Court has no jurisdiction to entertain the same.

23. In failing to find and conclude that the appellees have a plain, speedy, and efficient remedy before appellant Commission and the courts of the State of California and, therefore, the appellees are not entitled to the relief requested in their respective complaints.

24. In failing to find and conclude that the waters between the California mainland and Santa Catalina

Island are not a place outside the State of California within the meaning of the definition of interstate air transportation as set forth in the Civil Aeronautics Act of 1938.

25. In failing to find and conclude that air transportation between the California mainland and Santa Catalina Island is not interstate air transportation within the meaning of the Civil Aeronautics Act of 1938.

26. In failing to find and conclude that the Congress through the adoption of the Civil Aeronautics Act of 1938 has not preempted the field of regulation of air transportation between places in the State of California when that transportation involves passage through the air space over the high seas.

27. In failing to conclude that the Johnson Act, 28 U.S.C.A. 1342, precludes this Three-Judge District Court from issuing an injunction restraining appellant Commission from issuing directives and orders affecting the rates in question.

28. In failing to dissolve the temporary injunction outstanding against appellants and in failing to dismiss the complaints of appellees on file herein.

SUMMARY OF ARGUMENT.

The law of the State of California does not of itself require appellee air carriers to file tariffs covering their operations in question. It authorizes the State Commission to establish rates therefor.

The letters from the Secretary of the State Commission directing United to file tariffs are the beginning of the

administrative process. They are not directives which may be enforced through contempt proceedings, penalty actions, or otherwise.

By refusing to file such tariffs United has subjected itself only to the probability that an order of investigation will be instituted by the State Commission in which a formal determination will be made as to whether the State Commission has jurisdiction in the premises. The expense to which appellee air carriers may be put in appearing before the State Commission in such a proceeding does not constitute such irreparable injury as will entitle them to relief. The expense and annoyance of litigation is a part of the social burden of living under government.

Formal decisions and orders of the State Commission are issued after consideration of the evidence and arguments presented at a formal hearing and need not reaffirm the position taken by its Chief Counsel or in prior administrative letters from its Secretary.

The law imposes no penalty upon appellee air carriers for failure to file tariffs with the State Commission until they have been effectively ordered to do so in a formal proceeding. Appellants have made no threats to and will not seek to impose penalties upon appellee air carriers for refusal to file tariffs of the rates in question prior to such an effective order.

Appellees' concern regarding federal penalties is premature. The State Commission may establish the same rates that have been authorized by the Civil Aeronautics Board. Appellee air carriers will not be subject to penalty

under the Federal law if they apply intrastate rates to intrastate traffic. The fact that appellee air carriers claim they fear the imposition of penalties under Federal law does not prove that such fear is justified or based upon a reasonable interpretation of that law.

No case or controversy exists which entitles appellees to a declaratory judgment or equitable relief in any court until the administrative process has been exhausted.

The provisions of the Johnson Act prohibit the Federal District Court from enjoining the State Commission from establishing rates for the transportation in question.

The provisions of the Constitution of the State of California under which the State Commission claims jurisdiction over appellee air carriers pertain only to rates, fares and charges. The State Commission has never claimed jurisdiction over any other aspect of appellee air carriers' operations. Clearly in so far as the judgment of the Three-Judge Federal District Court restrains appellants from asserting jurisdiction over matters other than rates, fares and charges, it is not supported by the evidence and is in error.

As no substantial question regarding the validity of a state law under the Federal Constitution has been raised by appellees, the Three-Judge Federal District Court should have dissolved itself.

The Federal District Court was without jurisdiction to decide the case upon its merits.

The laws of the State of California provide for adequate relief from enforceable orders of appellant Commission

through review by the Supreme Court of California. Such review results in a final determination of all questions of State law. If the State Supreme Court resolves questions of State law against the State Commission *no appeal can be taken.* In the event the State Supreme Court sustains the validity of an order of the State Commission, where a substantial question respecting its validity has been raised under the Federal Constitution, treaties, or laws, a direct appeal can be taken to this Court. Neither public nor private interest will suffer. All questions of State and Federal law will be finally resolved by the appropriate tribunals and needless friction between State and Federal governments will be avoided.

In the present case the Federal District Court has made determinations respecting the law of the State of California. If this Court decides this case on the merits it also will make determinations respecting the State law. Conceivably both the lower Federal Court and this Court could improperly decide the State issues. In such event eitner the public or private interest will irreparably suffer.

The Federal District Court should have refused to issue a declaratory judgment because the declaratory complaints set forth a claim of right under the Federal law which in reality is in the nature of a defense to the action proposed by the State Commission under the State law.

The Federal District Court should have exercised its discretionary power to withhold equitable and declaratory relief in this case.

The waters between the mainland of California and Catalina Island are within the boundaries of and are a

part of the State of California. Intrastate rates of air carriers are subject to regulation by the State Commission and not by the Civil Aeronautics Board.

The regulation of the rates in question is a matter of local concern to the people of the State of California. Should this Court determine that a portion of the intervening waters between the mainland of California and Catalina Island is not within the geographical boundaries of the State of California, such waters are nevertheless within the jurisdiction of the State of California. As such waters are not outside the jurisdiction of the State of California the air carriage here under consideration does not pass *through air space over any place outside thereof* within the meaning of the provision of the Civil Aeronautics Act defining interstate air transportation. Through the enactment of the Civil Aeronautics Act the Congress intended to provide for the regulation of those rates of air carriers which could not be effectively regulated by the states. It did not intend to supersede effective state regulation.

Upon consideration of the merits of this case the Federal District Court should have declared that the rates in question are subject to the jurisdiction of the State Commission and should have dissolved the temporary injunction.

ARGUMENT.

I.

THE FEDERAL DISTRICT COURT HAD NO JURISDICTION TO DECIDE THE CASE ON ITS MERITS.

A. The California Constitution authorizes the State Commission to establish rates for common carriers. No provision of the State law requires air carriers to file tariffs with the State Commission prior to the issuance of an order by the State Commission pursuant to the procedural provisions of the California Public Utilities Code.

Appellee air carriers have made no reference to any provision in the constitution and statutes of the State of California which requires them to file tariffs with the State Commission, for there is none.

Section 22 of Article XII of the California Constitution authorizes the State Commission to establish rates for transportation by air carriers within the jurisdiction of the State. Pursuant to this provision, the State Commission may establish such rates by authorizing or ordering air carriers to file tariffs with said Commission:

> *United Air Lines, Inc., et. al.*, 50 Cal. P.U.C. 563 (1951); review denied, *United Air Lines v. Commission*, 37 A.C. 633, 1 (1951); appeal dismissed, *United Air Lines v. Commission*, 342 U.S. 908 (1952).

B. The letters from the Secretary of the Commission instructing United to file its tariffs were not issued pursuant to the procedural provisions of the Public Utilities Code and are not orders of the State Commission which may be enforced by contempt proceedings, or penalty actions brought pursuant to Section 2107 of the California Public Utilities Code, or otherwise.

Appellee air carriers state that prior to the trial of the case the State Commission gave no indication that it

did not consider its letters to appellees to be final administrative orders and determinations. The explanation is obvious. Prior to the trial of the case appellants had no thought that anyone would construe the letters from the Commission Secretary to be final administrative orders and determinations.

We can only ask why appellants needed to have informed appellee air carriers that the letters from the Commission Secretary were not to be construed as final administrative orders and determinations when appellee air carriers themselves, both priorly and subsequently to the trial of this matter, declared such to be the case?

The record shows that appellee air carriers were not misled by the letters from the Commission Secretary here under consideration.

We quote from the transcript of the hearing for preliminary injunction, August 8, 1952 (R. 142):

> "Judge Orr. It is our thought, Mr. Treadwell, that right now your job is to convince us that this is the proper forum to bring this action before.
>
> Mr. Treadwell. Oh, yes, I will be glad to do that.
>
> Judge Orr. We are more concerned about that right now than any other phase of the case.
>
> Mr. Treadwell. Well now, the situation is this, your Honor, on that: If the Public Utilities Commission had made some order which controls this route, undertook to control the route, there is no doubt that the proper procedure would be a writ of review from that order to the Supreme Court of the United States [California]. That would be what would be the actual way to proceed, the way you could proceed.
>
> But there is nothing of that kind here. There is no order. We have waited now a minimum of six years,

and probably much longer, according to the allegation of the complaint * * *"

We also quote from another portion of the same transcript, Mr. Treadwell speaking (R. 151):

"* * * if the Commission only threatened something, if they actually had done something, if they actually had done something, our remedy of course would be to go to the Supreme Court on a writ of review."

As recently as February 19, 1953, appellee air carriers in their answer to appellants' motion for new trial in comparing the facts of *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237 (1952), with those of the case here under consideration, stated regarding the present case (R. 98):

"There was no litigation pending, nor was there any existing administrative action concerning the route at the time the suit was commenced."

In order that administrative procedure accomplish its objective it, unlike judicial procedure, must be flexible. One of the most efficient and time-saving features of administrative procedure is the administrative letter which is signed by the Secretary of the Commission. Such letters usually proceed from informal investigations made by the staff of the Commission, the results of which investigations are presented to the Commission.

Where the information presented so justifies, the Commission authorizes the sending of a letter, signed by the Secretary of the Commission, calling to the attention of the utility that it appears that such utility is violating the law and directing corrective measures to be taken.

This procedure is constantly invoked and puts the utility upon notice as to the claimed violation of law with the hope that corrective measures will be taken and a formal proceeding will be obviated. If the utility refuses to comply, the next step is to institute a formal investigation where the procedure is substantially the same as in a judicial proceeding and out of which a formal decision is issued. The administrative letter is the first step in the administrative process.

It would be inefficient and unnecessarily time consuming to institute a formal proceeding in every case where a utility appears to be violating the law for the reason that most of these infractions are remedied after the same has been called to the attention of the utility by an administrative letter. Furthermore, in fairness to a utility, it should be given an opportunity, informally, to correct a situation before it has recorded against it a formal complaint issued by the Commission.

The utility is presumed to know the law and that an administrative letter is not a decision of the Commission within the contemplation of the law of the State of California.

C. The institution of an investigation before the State Commission to determine whether it should establish rates for the transportation in question will not subject appellees to such irreparable injury as will entitle them to declaratory and injunctive relief even though appellee air carriers may expend sums in excess of $3,000 in responding to such investigation.

Appellee air carriers claim and the District Court has concluded that a case or controversy exists under Section 1331 of the Judicial Code, 28 U.S. Code 1331, wherein the

sum of more than $3,000 is involved because the sums which appellee air carriers will expend if required to respond to an investigatory proceeding before the State Commission will exceed $3,000 (R. 60 and 62). Just as illogically the air carriers could contend that there is a case or controversy involving over $3,000 because the parties have expended and will expend aggregate sums considerably in excess of $3,000 in prosecuting and defending the present action in the Federal District Court and the United States Supreme Court, and also in the United States Court of Appeals where appellants have taken a precautionary appeal.

Appellees actually may incur greater expenditures by reason of their seeking to have the issues determined first in the Federal courts instead of permitting the administrative process to take its course.

The sums which appellee may expend in any forum do not constitute the subject matter of this action nor do they constitute such irreparable injury as will entitle them to equitable relief. As this Court has previously stated, "• • • the expense and annoyance of litigation is a price citizens must pay for life in an orderly society • • •", *Poulos v. New Hampshire*, 345 U.S. 395, 409, 97 L.ed. (Adv. Op.) 702, 710.

Petroleum Exploration, Inc. v. Public Service Commission of Kentucky, 304 U.S. 209, 220-222, 82 L.ed. 1294, 1302-1303;

Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 51-52, 82 L.ed. 638, 644-645.

D. Formal decisions of the State Commission are issued after consideration of the evidence and arguments presented at the formal hearing and need not necessarily reaffirm the position taken by its Chief Counsel or in prior administrative letters from its Secretary.

Who can say what decision will emanate from the State Commission if the facts and legal issues are presented to it for determination at a formal hearing? Certainly the Commission is not bound by prior administrative letters or by the opinions of its Chief Counsel in deciding matters under consideration before it. It renders its own decision after due deliberation upon the matters presented at the hearing. On many occasions the Commission has modified and reversed its own decisions in the light of evidence and arguments presented for consideration on rehearing.

The fact that an administrative agency or one of its hearing officers may have formed and expressed an opinion officially as to a case does not disable such agency or officer from hearing the same. So long as the party affected has an opportunity fully to present his position at the hearing, due process will be accorded.

National Labor Relations Board v. Pittsburgh Steamship Co., 337 U.S. 656, 659, 93 L.ed. 1602, 1606;

Federal Trade Commission v. Cement Institute, 333 U.S. 683, 700-703, 92 L.ed. 1010, 1034-1035;

National Labor Relations Board v. Donnelly Garment Co., 330 U.S. 219, 236-237, 91 L.ed. 854, 867.

E. The law of California imposes no penalty upon appellee air carriers for failure to file tariffs with the State Commission until said Commission effectively orders them to do so in a formal proceeding. Appellants have made no threats to and will not seek to impose penalties upon appellee air carriers for refusal to file tariffs of the rates in question prior to the issuance of such an effective order.

As previously stated no provision of the California law of itself requires air carriers to file tariffs with the State Commission. If the injunction issued by the Federal District Court is dissolved the State Commission will probably institute an investigation before itself in accordance with the procedures established in Sections 1701 through 1706 of the Public Utilities Code. If the Commission determines that it has jurisdiction it will proceed to establish rates covering the transportation in question or will order appellee air carriers to file tariffs of its rates for such transportation.

Only after a formal order of the Commission requiring appellee air carriers to file tariffs has become final will said air carriers be subject to the provisions of Section 2107 of the Public Utilities Code by reason of refusal thereafter to file tariffs.

The letters from the Secretary of the Commission contain no threats that appellants will institute penalty actions if the tariffs are not filed. We have previously pointed out in the Statement in this brief that the record shows appellants have made no such verbal threats (R. 197, 200).

Finding 11 of the District Court states that appellants disclaim any intention of instituting proceedings to recover penalties against appellee United for its failure to file tariffs with the Commission unless and until such time as

United fails to file its tariffs with appellant Commission after having been formally ordered to do so in a proceeding instituted before the Commission for the purpose of ascertaining jurisdiction (R. 60).

Finding 12 states that appellants in the past have caused proceedings to be instituted in the California courts for the recovery of penalties against various air carriers, including appellee United, in other cases wherein disputes have existed concerning the regulatory jurisdiction of the State Commission (R. 61).

A brief summary of the facts and the considerations which led the State Commission to institute the penalty action against appellee United will disclose matters *which are entirely dissimilar and not present in the case here under consideration* (R. 171).

Prior to March 1, 1951, United had tariffs on file with the Public Utilities Commission covering its coach fares between San Francisco and Los Angeles, and these fares were thereby established by the Commission under Section 22 of Article XII of the California Constitution.

United, prior to March 1, 1951, applied to the Public Utilities Commission for authorization to increase such coach fares on March 1. The Commission refused to grant the application because insufficient information had been furnished. Nevertheless, on March 1, United increased its fares without the necessary authorization from the Commission.

After the institution by the Commission of a formal investigation and public hearing the Commission issued its Decision No. 45624, 50 P.U.C. 563, effective May 9,

1951, authorizing United to increase its fares and ordering United to make reparation of the excess fares collected between March 1 and May 8, 1951, inclusive. A petition for writ of review of this decision was filed with the California Supreme Court. The writ was denied. *United Air Lines v. Commission*, 37 A.C. 633, 1(1951). The appeal to this Court was dismissed on the ground that no substantial Federal question was involved. *United Air Lines v. Commission*, 342 U.S. 908 (1952).

Subsequently, the People of the State of California filed a penalty action against United under Section 2107 of the California Public Utilities Code. This proceeding was filed because United, in violation of the provisions of Sections 20 and 22 of Article XII of the California Constitution, had charged during the period March 1 through May 8, 1951, fares in excess of those established and authorized by the Commission.

Do the above essential facts exist in the present case? The answer is an unequivocal *no!* The Commission has made no claim that appellee air carriers have charged fares in excess of those established and authorized by the Commission, but, on the contrary, admits that no fares covering appellee air carriers' Catalina operations have been established by the Commission. Appellants are here asserting only that they should be permitted to institute a proceeding before the Commission for the purpose of determining whether rates covering appellee air carriers' Catalina operations should be established pursuant to Section 22 of Article XII of the California Constitution.

F. There is no evidence in the record and consequently no finding that the State Commission will establish rates for appellee United covering the operations in question different from the rates already established in its tariffs on file with the Civil Aeronautics Board. Consequently, appellees' concern regarding federal penalties is premature. Appellee air carriers will not be subject to penalty under the Federal law if they apply intrastate rates to intrastate traffic.

Appellee United's concern over Federal penalties is premature.

If the Commission establishes the same rates as have been established in tariffs on file with the Civil Aeronautics Board, appellee air carriers have no problem respecting penalties. If the Commission establishes different rates, its order may be stayed until the jurisdictional questions are resolved.

In any event, no controversy can arise until the Commission has taken appropriate administrative action establishing rates for appellee air carriers' Catalina operations.

As the State Commission regulates intrastate rates and the Civil Aeronautics Commission regulates interstate rates there is no requirement that the rates established by the State agency be the same as those established by the Federal agency. Appellee air carriers will not be subject to any penalty under the Federal law if they apply intrastate rates to intrastate traffic even though such rates be different from the interstate rates established between the same points. The fact that appellee air carriers claim they fear the imposition of penalties under Federal law does not prove that such fear is justified or based upon a reasonable interpretation of that law.

G. The exhaustion of the administrative processes before the State Commission is a condition precedent to the exercise of jurisdiction by the Federal District Court.

Appellee air carriers have brought this action to guard against the possibility that the State Commission in the exercise of its administrative authority will establish rates for the transportation in question. Appellees ask that they win any such case before it is commenced.

In *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237, this Court has stated on pages 246-248:

> "Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Eccles v. Peoples Bank*, 333 U.S. 426. See *Colegrove v. Green*, 328 U.S. 549. Responsibility for effective functioning of the administrative process can not be thus transferred from the bodies in which Congress has placed it to the courts.
>
> "But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which

either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

"Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission can not hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

"The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right."

We were surprised to find counsel for the Civil Aeronautics Board arguing in the Federal District Court that to permit appellee air carriers to submit to a formal proceeding to be instituted by the State Commission would subject them to such irreparable injury as to entitle them to equitable relief in the Federal District Court (R. 214-217). Put the shoe on the other foot. Suppose United claimed that the transportation in question was intrastate rather than interstate and the Civil Aeronautics Board were seeking to require United to obtain a certificate of public convenience and necessity and file tariffs of its rates and charges. Would the Civil Aeronautics Board contend and would the Federal District Court hold that the Federal Court in an application for an injunction by United should determine the jurisdictional question of whether the transportation were intrastate or interstate prior to the exhaustion of the administrative process? We think not. *Federal Power Com. v. Arkansas Power and Light Co.*, 330 U.S. 802, 803, 91 L.ed. 1261, where this Court held that the administrative processes of the Federal agency must first be exhausted, is a good illustration of this point.

In *Tobin v. Banks & Rumbaugh*, 201 F.2d 223, the Court of Appeals held that Section 6(c) of the Administrative Procedure Act authorizing the court to enforce administrative subpoena to the extent it is "in accordance with law," does not require the court in a proceeding under the Fair Labor Standards Act seeking the enforcement of investigative subpoena first to determine that employment within the meaning of the statute is covered. The employer had urged that the court should determine

whether the employer and the subject matter to which the subpoena is directed are covered by the Act.

The Court of Appeals, 201 F.2d 223, 226, in following the rule laid down in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507-510, made the following appropriate statement:

> "* * * To give effect to (the employer's) contention would, in most instances, sterilize the investigative powers of the Administrator and force him to trial without the benefit of the very evidence which the subpoena is designed to secure. Refusal of the courts to refrain from adjudicating the issue of coverage in the enforcement proceeding would result in a maelstrom of confusion, for by their refusal to permit investigation, employers would be enabled to secure a premature judgment on that issue and the very evil which Congress sought to overcome would prevail over the guardian appointed to correct it."

We also quote from *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-52, 82 L.ed. 638, 644-645:

> "Third. The corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judi-

cial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

"Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

The following cases also support the rule that the administrative process must be exhausted:

Federal Power Commission v. Arkansas Power and Light Company, 330 U.S. 802, 803, 91 L.ed. 1261;

Macauley v. Waterman S. S. Corporation, 327 U.S. 540, 543-545, 90 L.ed. 839, 841-843;

Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507-510, 87 L.ed. 424, 428-430;

Rochester Telephone Corporation v. United States, 307 U.S. 125, 130; 83 L.ed. 1147, 1152.

The cases cited in the opinion of the Federal District Court may be distinguished. Neither in *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, nor *Cloverleaf Co. v. Patterson,* 315 U.S. 148, was a Three-Judge District Court invoked and in neither case was the issue of exhaustion of the administrative process raised. The case of *Public Utilities Commission of Ohio v. United Fuel Gas Co.,* 317 U.S.

456, may be distinguished from the case now before the Court for the following reasons: (1) In the *United Fuel Gas Company* case the administrative process had been exhausted, and (2) the *United Fuel Gas Co.* case had been pending in the Federal courts over seven years at the time of the argument before this Court, and the majority was of the opinion that the matter should be finally disposed of after such an undue length of time.

We also quote from page 245 of the *Wycoff* case, 344 U.S. 237, previously referred to:

> "* * *, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment. If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us. * * *"

The issuance of a rate order by the State Commission establishing rates for the transportation in question would be the exercise of legislative authority delegated to the Commission. Such a legislative order has not yet been issued. Nevertheless, appellees urge and the Federal District Court has declared that the State Commission has no power even to consider the establishment of such rates, in a formal proceeding instituted before itself pursuant to the provisions of the California Public Utilities Code. We again urge that this Court not permit the quasi-legislative processes under which the State Commission functions to be so subverted.

We also wish to point out that the subpoena power of an administrative agency is broader than that of a court. Its powers are like those of a grand jury. It is not necessary that a case or controversy exist. The investigatory proceedings may be instituted to determine if one does exist.

U. S. v. Morton Salt Co., 338 U.S. 632, 641-644, 94 L.ed. 401, 410-411.

H. The provisions of the Johnson Act prohibit the Federal District Court from enjoining the State Commission from establishing rates for the transportation in question.

Under certain circumstances the provisions of the Johnson Act, Section 1342 of Title 28, U.S. Code (28 U.S.C.A. 1342) prohibit Federal District Courts from enjoining the operation of, or compliance with, orders of state regulatory commissions affecting rates. The provisions of the Johnson Act are fulfilled in the instant case.

1. The jurisdiction of the Three-Judge District Court, if it exists, rests solely on the repugnance to the Federal Constitution of the penalty provisions of the California Public Utilities Code through which appellees claim the State Commission will force appellee air carriers to file tariffs and thereby establish the rates; and,

2. An order of the State Commission establishing rates for the transportation in question will not interfere with interstate commerce; and,

3. Such order, if issued, will be made in a formal investigatory proceeding before the State Commission after reasonable notice and hearing; and,

4. A plain, speedy and efficient remedy may be had in the Supreme Court of California to review any such order which may be issued by the Commission.

I. In so far as the judgment of the Federal District Court pertains to matters other than the establishment and regulation of rates, fares, and charges for transportation over the route in question, it is not supported by the record and is in error.

The provisions of the Constitution of the State of California under which the State Commission claims jurisdiction over appellee air carriers pertain only to rates, fares, and charges. Appellants have never claimed jurisdiction over any other aspect of appellee air carriers' operations. In so far as the judgment of the Federal District Court pertains to matters other than the establishment and regulation of rates, fares and charges of appellee air carriers, it is not supported by the record and is clearly in error.

This Court will note that appellee air carriers, in their statement in opposition to our jurisdictional statement, have made no comment regarding the claim that the judgment of the Federal District Court is too broad in its scope.

J. As there is no substantial question involved in this case concerning the validity under the Federal Constitution of Section 2107 of the California Public Utilities Act, the Three-Judge Federal District Court should have dissolved itself.

No claim or assertion of right has been made by the State Commission against appellee air carriers under Section 2107 of the Public Utilities Code by reason of United's failure to file tariffs covering the operations in

question. Therefore, there is no substantial question concerning the validity of Section 2107 under the Federal Constitution. The Three-Judge District Court should have so found and dissolved itself as the jurisdictional requirements of 28 U.S.C. 2281 are not met.

California Water Service Co. v. City of Redding, 304 U.S. 252, 82 L.ed. 1323;

City of Springfield v. U. S., 99 F.2d 860, cert. den. 306 U.S. 650, 83 L.ed. 1049;

Bowles v. Case, 9 Cir., 149 F.2d 777, affirmed 327 U.S. 92;

Ex parte Bransford, 310 U.S. 354;

Cf. *Farmers Gin Co. v. Hayes*, 54 Fed. Supp. 43;

Penn Greyhound Lines v. Board of P.U. Comrs., 107 Fed.Supp. 521.

The administrative process has not been exhausted. No case or controversy exists, and appellees are subject to no irreparable injury, which entitles them to judicial relief.

The Johnson Act precludes the issuance of the injunction to the extent that it pertains to rates, and, in so far as the judgment below affects matters other than rates, it is too broad in its scope and is in error. As no substantial question has been raised regarding the validity of Section 2107 of the California Public Utilities Code, the Three-Judge District Court should have dissolved itself. The three judges sitting as a Federal District Court also were without jurisdiction to decide the case upon its merits.

II.

THE FEDERAL DISTRICT COURT SHOULD HAVE EXERCISED ITS DISCRETIONARY POWER TO WITHHOLD EQUITABLE AND DECLARATORY RELIEF IN THIS CASE.

A. An adequate remedy exists in the courts of the State of California for the purpose of reviewing any order issued by the State Commission pertaining to the subject matter of this action.

Appellee air carriers assert that Section 20 of Article XII of the Constitution of California limits judicial review of rate action by appellant Commission to questions of confiscation, and claim that since the review is so limited it is inadequate for the controversy here involved.

We wish to point out to this Court that Section 20 of Article XII of the California Constitution is not involved in this proceeding. No application to increase rates or charges for the transportation in question has been filed by appellee air carriers with appellant Commission.

Section 20 reads as follows:

> "No railroad or other transportation company shall raise any rate or charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the railroad commission [now Public Utilities Commission] provided for in this Constitution, that such increase is justified, and *the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property.*" (Emphasis added.)

The above-quoted limitation is on judicial review of a Commission decision upon a showing whether an increase in rates is justified, not on a Commission decision on the question whether it has jurisdiction to establish rates for a carrier.

This Court will note that appellee United had no hesitancy in urging review of jurisdictional matters in its recent appeals from Commission Decision No. 45624, *United Air Lines, et al.*, 50 Cal. P.U.C. 563 (1951), to the California Supreme Court and to the United States Supreme Court, supra. We are confident that both courts had no hesitancy in considering on their merits the jurisdictional questions raised by United. It is preposterous for appellee air carriers to urge before this Court that they are precluded under California law from obtaining effective judicial review of rate action taken by appellant Commission when no issue of confiscation, but only issues relating to jurisdiction, are involved.

Sections 1756 through 1767 of the California Public Utilities Code not only provide adequate, but also preferred, judicial review of orders and decisions of the State Commission. If, as appellees state, their remedies in the California courts are *niggardly*, it is because of the questionable merits of their case and not because inadequate provision has been made under the California law for judicial review.

Review of a State Commission decision by the California Supreme Court results in a final determination of all questions of State law. If the State Supreme Court resolves questions of State law against the State Commission *no appeal can be taken.* Even if questions of Federal

law are resolved against the State Commission by the State Supreme Court the State Commission will be far less likely to appeal from such adverse decision than from a similar decision from a lower Federal court. In the event the State Supreme Court sustains the validity of an order of the State Commission, where a substantial question respecting its validity has been raised under the Federal Constitution, treaties, or laws, a direct appeal can be taken to this Court. Neither public nor private interest will suffer. All questions of State and Federal law will be finally resolved by the appropriate tribunals and needless friction between State and Federal governments will be avoided.

In the present case the Federal District Court has made determinations respecting the law of the State of California. If this Court decides this case on its merits it also will make determinations respecting the State law. Conceivably both the lower Federal Court and this Court could improperly decide State issues. In such event either the public or private interest will irreparably suffer.

In support of our position that the Federal District Court should have refused to grant relief in this case, we quote from *Alabama Commission v. Southern Railway*, 341 U.S. 341, 349-351, 95 L.ed. 1002, 1009:

> "* * * Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests

have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. * * *

"'This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts. * * * On the contrary, it is but a recognition * * * that a federal court of equity * * * should stay its hand in the public interest when it reasonably appears that private interests will not suffer. * * *

"'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.'"

We also rely on the language previously quoted from pages 246-248 of the *Wycoff* case, 344 U.S. 237, 97 L.ed. (Adv. Ops.) 176, and on *Alabama Public Service Commission v. Southern Railway*, 341 U.S. 363, 365-366, 95 L.ed. 1016, 1019.

Congress in enacting the Johnson Act (28 U.S.C. 1342), previously referred to, and Section 265 of the Judicial Code, now 28 U.S.C. 2283, which provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

has given recognition to the problems arising from the Federal-State relationship.

In *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 141, 86 L.ed. 100, 109, this Court states:

> "Section 265 is not an isolated instance of withholding from the federal courts equity powers possessed by Anglo-American courts. As part of the delicate adjustments required by our federalism, Congress has rigorously controlled the 'inferior courts' in their relation to the courts of the states. The unitary system of the courts of England is saved these problems.
>
> "The guiding consideration in the enforcement of the congressional policy was expressed by Mr. Justice Campbell, for the Court, in *Taylor v. Carryl*, 20 How. (U.S.) 583, 597:
>
> " 'The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the State and of the Union in any collision.' "

The case of *Bethlehem Steel Corp. v. N. Y. State Labor Relations Board*, 330 U.S. 767, cited in the opinion of the Court below, is not authority for a Three-Judge District Court to assume jurisdiction in this proceeding. The appeal in the *Bethlehem Steel Corp.* case was from the New York Court of Appeals. We are likewise contending that this matter should be permitted to proceed through the Supreme Court of the State of California.

B. The Federal District Court should have refused to issue a declaratory judgment because the declaratory complaints set forth a claim of right under the Federal law which in reality is in the nature of a defense to action proposed by the State Commission.

Appellants are making no claim under Federal law. The claim of jurisdiction to establish rates covering the operations in question is founded upon Section 22 of Article XII of the Constitution of the State of California. The appellees' claim under the Civil Aeronautics Act is in the nature of a defense.

We quote from the majority opinion of *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237, 248, 97 L.ed. (Adv. Ops.) 176, 183:

> "* * * Where the complaint in action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. * * *."

We submit that the Federal District Court should have exercised its discretionary power to withhold equitable and declaratory relief to avoid needless friction with the State policies.

III.

UPON A CONSIDERATION OF THE MERITS OF THIS CASE, THE FEDERAL DISTRICT COURT SHOULD HAVE DECLARED THAT THE RATES FOR THE TRANSPORTATION IN QUESTION ARE SUBJECT TO THE JURISDICTION OF THE STATE COMMISSION AND SHOULD HAVE DISSOLVED THE TEMPORARY INJUNCTION.

A. Transportation by appellee air carriers only between the mainland of California and Catalina Island is wholly within the State of California and involves intrastate and not interstate commerce. The rates covering such transportation are subject to the jurisdiction of the State Commission.

A proceeding to ascertain the exact boundaries of the State of California is now before this Court. *United States v. California,* October Term, 1953, No. 6, Original.

In this proceeding the State of California claims that the waters between the mainland of California and Catalina Island are inland waters of the State of California. The Report of the Special Master dated October 14, 1952, finds otherwise, but the State of California has filed exceptions to this report.

Appellants herein likewise claim that the route in question is wholly within the boundaries of the State of California. In support of this claim, we refer this Court to the comprehensive brief dated June 6, 1952, submitted by the Attorney General of the State of California in the proceeding before this Court, entitled *United States v. California,* October Term, 1953, No. 6, Original.

We shall briefly state the arguments in support of our claim that the route in question is wholly within the boundaries of the State of California.

Section 1 of Article XXI of the California Constitution of 1849 defines the westward boundary of the State of California as follows:

> "Section 1. The boundary of the State of California shall be as follows: * * * thence running west and along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence, running in a northwesterly direction and following the direction of the Pacific Coast, to the forty-second degree of north latitude; thence, on the line of said forty-second degree of north latitude, to the place of beginning. Also all the islands, harbors, and bays along and adjacent to the coast."

Congress accepted the California Constitution and passed the Act of Admission. (Act of Sept. 9, 1850, 9 Stat. 452.)

Under the decision of this Court in *United States v. California*, 332 U.S. 19, this Court recognized that all waters shoreward of the base line of the three-mile marginal belt are inland waters. Hence, all the area within California constitutional boundaries, with the exception of the three-mile marginal belt, constitute inland waters of the State.

The inclusion of the islands as specified in the California Constitution strongly suggests that the boundary was intended to run around them. The phrases "running in a northwesterly direction" and "following the direction of the Pacific Coast" indicate that the boundary of California runs outside the off-lying islands.

Such a boundary would be consistent with the position taken by the United States in the Alaska Boundary Arbitration that the relevant coast line for boundary purposes is the political coast line which treats all off-lying islands as part of the mainland (4 Alaska Boundary Arbitration 31) and with the decision of the International Court of Justice in *United Kingdom v. Norway*, I.C.J. Reports, 1951, p. 116, previously referred to in our jurisdictional statement.

Sound historical basis supports the establishment of the California boundary so as to include as its inland waters the area shoreward of the off-lying islands. In 1790, when California was still a Spanish possession, England expressly stipulated in Article 4 of the Nootka Treaty with Spain that "British subjects shall not navigate nor carry on their fisheries in the said seas within the distance of 10 maritime leagues from any part of the coast already occupied by Spain." (W. R. Manning, The Nootka Sound Controversy, Am. Hist. Assn. Annual Report 1904, p. 279.) A line 10 maritime leagues from the coast would include the waters between the California mainland and Catalina Island.

In 1879 the last sentence of Section 1 of Article XXI of the California Constitution was revised to read: "Also, including all islands, harbors, and bays along and adjacent to the coast."

We quote from the California Attorney General's brief dated June 6, 1952, in *United States v. California*, No. 6, Original, the discussion concerning certain California cases.

Pages 49 and 50:

"The first case in which the constitutional provision came before the California Supreme Court was *Ex parte Keil,* 85 Cal. 310 (1890). There the Court held that the transportation of two sailors from the California mainland to Catalina Island did not constitute taking them 'out of the state' within the meaning of the California kidnapping statute. (Penal Code Sec. 207.) The Court reached the conclusion as a matter of construction of the Penal Code and it did not decide the 'nice and important question, as to which the Court is not agreed, * * * whether or not any part of the channel between Santa Catalina and the mainland is, as between the state and the nation, or as between the United States and foreign nations, a part of the high seas.' However, the concurring opinion by two judges makes it apparent that the other five members of the Court were of the opinion that the channel waters were a part of this state.[13]"

Note 13 on page 50 reads:

"[13]In *Wilmington Transportation Co. v. Railroad Commission,* 166 Cal. 741 (1913), affirmed 236 U.S. 151 (1915), the California Supreme Court held that transportation of freight and commerce from the California mainland to Catalina is not 'commerce with foreign nations' so as to oust the State Railroad Commission of jurisdiction. The Court assumed that the cross-channel voyage took the vessels on to the high seas and out of the jurisdiction of California. Since, however, the question was not raised or argued, these assumptions cannot be considered authoritative. Moreover, in considering the effect of this case, it is well to bear in mind the following statement by the International Court of Justice in *United*

Kingdom v. Norway: 'The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice.' (Judgment p. 138.)"

Pages 51 and 52:

"Probably the most significant of the California Supreme Court cases is the most recent one, *People v. Stralla*, 14 Cal. 2d 617 (1939). The question in the case was whether a gambling ship anchored four miles from shore in Santa Monica Bay was within California's territorial jurisdiction so as to be subject to her criminal statutes. The District Court of Appeal held that there was no such jurisdiction.

"In his petition for hearing in the Supreme Court the Attorney General of California urged as his first point that Santa Monica Bay was a bay within the meaning of that term as used in the California constitutional provision. The Attorney General went on, however, to devote a section of his petition to the proposition that under the Constitution, 'That body of water lying easterly of the islands adjacent to the coast is within the boundaries of the state of California.' In the course of the argument, the Attorney General pointed out that 'by the very words of the Constitution the islands are included within the boundary,' and that 'by including the islands within the boundary, the water lying easterly of the islands is necessarily within the boundary.' This position advanced by California constitutes in itself an assertion of jurisdiction by the state.

"• • • the United States Attorney, who stated (Appendix 3, p. 2) that he was 'acting on the express direction of the Attorney General of the United States

and in the name and in behalf of the United States of America,' filed an *amicus curiae* brief in support of California in which he adopted the brief for California in its entirety. (Appendix 3, p. 12.) On the basis of these briefs, the California Supreme Court determined that Santa Monica constitutes a bay within the meaning of that term as used in the Constitution of 1849. Consequently the Court held that 'the jurisdiction of the state extends over the waters of Santa Monica Bay landward from a line drawn between its headlands, Point Vincente and Point Dume, and *at least* for a distance of three miles oceanward from that line.' (14 Cal. 2d, at 633.) The inclusion of the phrase 'at least' in the holding indicates that while the Court was following the salutary principle of deciding no more than necessary to dispose of the case before it, it wished to preserve California's jurisdiction beyond the area in dispute." (Italics ours.)

In 1949 the California legislature in Section 170 of the Government Code spelled out with more precision the western boundary which was defined in the Constitution one hundred years earlier:

"170. *Declaration of boundary of State.* To give greater precision to the boundary of the State of California as defined in Article XXI of the Constitution, it is hereby declared that the part of the boundary which is described as 'running in a northwesterly direction and following the direction of the Pacific Coast to the forty-second degree of north latitude,' and as 'including all the islands, harbors, and bays along and adjacent to the coast,' runs and has in the past run three English nautical miles oceanward of lines drawn along the outer sides of the outermost

of the islands, reefs and rocks along and adjacent to the mainland and across intervening waters; * * *"

Section 171 of the Government Code defines inland waters as follows:

"171. *Inland waters of State defined.* All waters between the mainland and the outermost of the islands, reefs and rocks along and adjacent to the coast of the State of California from which the boundary of the State is measured, and all waters between the islands, reefs and rocks themselves, are declared to be and to have been in the past inland waters of the State. Similarly, all waters within the lines around harbors and across bays, from which the boundary of the State is measured, are declared to be and to have been in the past inland waters of the State. These waters are 'waters thereof' within the meaning of that phrase in Section 25 of Article I of the Constitution."

We quote further from the brief of the Attorney General of California, pages 57 and 58:

"In establishing its seaward boundary so as to assert jurisdiction over the channels, bays, and harbors along its coast, California was acting well within its authority under the federal system. In *Manchester v. Massachusetts*, 139 U.S. 240 (1891) the United States Supreme Court had before it a situation which closely parallels the assertions of jurisdiction that have been made by California. The Public Statutes of Massachusetts provide that 'when an inlet of the sea does not exceed two marine leagues in width between its headlands,' the boundary of the state is a 'straight line from one headland to the other.' Massachusetts

sought to enforce in Buzzard's Bay its statutes regulating fishing which were confined by their terms to waters 'within the jurisdiction of this Commonwealth.' Manchester challenged the enforcement of the regulatory statutes on the grounds that the waters of the Bay were beyond the jurisdiction of Massachusetts. He argued that jurisdiction over the waters of the Bay rested 'upon rights of sovereignty inseparably connected with national character' and thus was exclusively vested in Congress.

"The Supreme Court explicitly upheld the authority of Massachusetts to define its boundaries so as to bring within its jurisdiction such inland water areas as Buzzard's Bay. The Court said:

> "'* * * Within what are generally recognized as the territorial limits of States, by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties; and by this test the Commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties.'

As this quotation indicates the only restriction placed by the Court on the State's power to assert jurisdiction over inland waters was that the assertion must not exceed the limits of international law. The Court went on to hold that in the absence of any conflicting federal regulation, Massachusetts could exercise its jurisdiction over the Bay by enforcing its statutes regulating fishing."

We also quote from pages 118-121 of the brief of the Attorney General of California:

"1. Many nations have found it advantageous to adopt the exterior coastline extending around off-

lying islands as the baseline for their marginal sea. These nations include Australia, Canada, Denmark, Ecuador, Fiji, Finland, France, Hawaii, Iceland, Iran, Norway, Russia, Saudi-Arabia, Sweden;

"2. The system of the exterior or political coast line contravenes no principle of international law;

"3. The use of the exterior coast line as a base line for the marginal sea does not depend on any arbitrary or limited distance that such a line may extend across a water area. The line in each case is a political line based upon laws or decrees of a sovereign state and not upon any arbitrary limitation of distance;

"4. That the United States is free, if it finds that it is in the national interest to do so, to recognize and declare that the waters between the off-lying islands of California and the mainland are wholly inland waters.

"*National Security.* The Supreme Court recognized the close relationship between the marginal belt and our national security by pointing out that it was a 'protective belt' which will be of 'crucial importance should it ever again become impossible to preserve that peace.' (332 U. S. at 35.) As this statement by the Supreme Court indicates, the military advantage or disadvantage of any of the suggested locations of the marginal belt is a matter of the highest importance to our national security.

"The strategic importance of the California coastal areas is amply demonstrated by mentioning a few of the many military installations which dot the shoreline and the offlying islands of the area in issue here. San Clemente Island has been completely taken over

by the Navy and civilians are not permitted to enter. [Tr. p. 613.] Defense installations have been made on San Miguel and San Nicolas Islands in the Santa Barbara Channel. [Tr. p. 330.] A substantial part of the facilities on Catalina Island were taken over for defense purposes during World War II.

"These islands guard a chain of Army, Navy and Air Corps bases on the shore of the mainland. Shoreward from the Santa Barbara Channel lies Point Mugu, an important guided missile installation, and Point Huenème, which has tremendously expanded as a Navy base in recent years. (Tr. p. 248.) San Pedro Bay is a western base for the Pacific Fleet of the Navy, as well as being adjacent to the Navy Air Station at Reeves Field and the Army's Fort MacArthur. San Clemente Island protects the approach to the major Navy base at San Diego, the Navy Air Station at North Island and the Marine Base at Camp Pendleton.

"The presence of these vital military installations in the coastal areas in issue here make it especially relevant to reiterate that the distribution of rights in the offshore area among various nations will be determined by fixing the outer limits of inland water. As we move seaward through the water areas which our nation may designate as its inland waters and marginal belt to the high sea, the rights and powers of the United States diminish, while conversely, the rights of foreign nations increase. This is strikingly illustrated by the rights of foreign warships and airplanes in the respective zones in the offshore area.

"Foreign warships and aircraft are at all times wholly unrestricted in their movement on the high seas. The rights of foreign warships in the marginal

belt are at present in doubt, as shown by the fact that the International Court of Justice declined to rule on this point in the Corfu Channel case.[29] But in its inland waters, the adjacent nation has exclusive and complete control.

"The agency which determines the outer limits of inland waters will thus be doing much more than fixing a theoretical line. It will be determining how near foreign warships and aircraft may lawfully approach our shores and harbor installations. It also will be fixing the location of our neutrality zone, for that has been one of the historic functions of the marginal belt. The sum of the matter is that the fixing of the baseline will determine whether foreign nations are to have rights in the waters surrounding our island military installations and between these installations and our coastal bases or whether those waters are to be set aside for the exclusive jurisdiction of the United States.

"It would appear that there are military dangers to placing the belt immediately adjacent to our shores, and on the other hand, military advantages to placing it as far seaward as possible. It is the belief of California that the protection of our harbors, the security of our military bases on the shore and on the offshore islands, and the integrity of our inland shipping lanes demand the placement of the marginal belt as far seaward as can be done within the limits of international practice. There would appear to be a substantial risk of subverting the best interests of our nation by the adoption of a proposal for the location of the marginal belt, such as that offered by Plaintiff, which completely ignores the significance of the areas to our National security."

---

[29] I. C. J. Reports, 1949, p. 4.

Subsequent to the filing of the Master's Report with this Court in *United States v. California*, No. 6, Original, the Congress of the United States has enacted the Submerged Lands Act, Chapter 65, Public Laws 31, 83rd Congress, reprinted in U. S. Code and Administrative News, 1953, No. 9, pages 1175-1180.

We quote from the provisions of this act.

"Sec. 2. When used in this Act——

"(a) The term 'lands beneath navigable waters' means——

* * * * * * *

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, * * *

* * * * * * *

"Sec. 4. Seaward Boundaries.

—The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or

hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond the three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

These sections show that Congress gives recognition to the fact that a State's seaward boundaries may extend more than three miles from its coast. We have demonstrated that the boundaries of California extend beyond Catalina Island.

United is an interstate as well as an intrastate air carrier and hence must file rates covering its California operations both with the Civil Aeronautics Board and with the appellant Commission. For example, tariffs of United's air coach fares for passenger transportation between San Francisco and Los Angeles are on file with both Commissions. In support of their position that the Civil Aeronautics Board has exclusive jurisdiction over the rates in question, appellee air carriers state that they have had tariffs of rates covering the operations in question on file with the Civil Aeronautics Board for thirteen years and that they have never filed tariffs of such rates with appellant Commission. Even though this Court finds that appellee air carriers must file rates covering its Catalina operations with appellant Commission, appellee

air carriers undoubtedly will continue to file such rates with the Civil Aeronautics Board in so far as they involve interstate commerce. The fact that the appellant Commission may not have asserted jurisdiction over the rates in question for a period of years does not destroy its authority to do so. *Kelly v. Washington,* 302 U.S. 1 (1937).

The case of *Northwest Airlines v. Minnesota,* 322 U.S. 292 (1944), to which reference is made by appellee air carriers refers to "regulating air commerce" and not to "regulating air transportation". Under the Civil Aeronautics Act the Civil Aeronautics Board regulates only the rates charged by air carriers in "air transportation".

We submit that the route of appellee air carriers in question is an intrastate route, and the intrastate rates in question may be established by appellant Commission. *United Air Lines, Inc. et al.,* 50 Cal. P.U.C. 563 (1951); review denied, *United Air Lines v. Commission,* 37 A. C. 633, 1 (1951); appeal dismissed, *United Air Lines v. Commission,* 342 U.S. 908 (1952).

B. Through the enactment of the Civil Aeronautics Act Congress has not preempted the regulation of the rates of appellee air carriers for transportation over the routes in question wholly between the mainland of California and Catalina Island.

The ~~rates,~~ fares and charges for transportation by air carriers between the mainland of California and Catalina Island where the transportation over such route has not previously or subsequently passed over the territory of any other state or country is a matter primarily of local concern to the people of the State of California. In the absence of preemption of the field of regulation by the

Federal authority such rates, fares, and charges are subject to the regulatory jurisdiction of the appellant Commission. *Wilmington Transportation Co. v. Railroad Commission*, 236 U.S. 151, 156, 59 L.ed. 508, 517; *United Air Lines, Inc., et al.*, 50 Cal. P.U.C. 563; review denied, *United Air Lines v. Commission*, 37 A.C. 633, 1; appeal dismissed, *United Air Lines v. Commission*, 342 U.S. 908.

We also refer this Court to the case of *U. S. v. Yellow Cab Company*, 332 U.S. 218, 230-234, 91 L.ed. 2010, 2020-2022, wherein this Court held that the Sherman Anti-Trust Act does not apply to that type of interstate commerce which exists where a railroad passenger rides in a taxicab from his home to a railroad station in Chicago in connection with an interstate journey and where a railroad passenger completing an interstate journey rides from a railroad station in Chicago to his home. The holding in this case was reaffirmed by this Court in the case of *U. S. v. Yellow Cab Company*, 338 U.S. 338, 339, 94 L.ed. 150, 152.

The Sherman Anti-Trust Act has fully occupied the field of interstate and foreign commerce but, nevertheless, this Court held that the particular taxicab transportation in question, although it admittedly is interstate commerce, is not the type of interstate commerce that the Congress intended the statute to cover. This Court pointed out that the taxicab operations in question are so predominantly of a local nature that it must be assumed that the Congress never intended that it be subject to the Sherman Anti-Trust Act.

The air carrier operations between the mainland of California and Catalina are so predominantly of a local nature as to exclude them from the intent of Congress

to cover them in its definition of interstate air transportation under the Civil Aeronautics Act. *The particular transportation involved,* even though it be admitted for the sake of argument that it is something other than intrastate commerce, *is not the type of commerce which the Civil Aeronautics Act covers.*

The contrary interpretation placed upon the Civil Aeronautics Act by the lower Federal Court and appellees leads to results sufficiently absurd to condemn any such interpretation. For example a United plane carrying passengers between San Francisco and Los Angeles by flying out to sea beyond the 3-mile limit and then returning to the California shore could avoid having its rates for intrastate passengers regulated by the State Commission.

One of the strongest presumptions known to the law is that Federal authority has not superseded State authority because the superseding of State authority by the Federal government strikes at that delicate balance between Federal and State jurisdictions upon which our Federal form of government is based. The superseding of State authority will be declared only where there is no possible doubt as to the clear intent of the Congress so to supersede State authority. Furthermore, it must clearly appear that the Federal invasion of State authority is necessary. Nothing must be left to inference or presumption.

Palmer v. Massachusetts, 308 U.S. 79, 82-85, 84 L.ed. 93, 96-99;

Yonkers v. United States, 320 U.S. 685, 690-691, 88 L.ed. 400, 403-405;

North Carolina v. United States, 325 U.S. 507, 511, 89 L.ed. 1760, 1765;

Arkansas R. R. Commission v. Chicago, Rock Island & Pac. R. R. Co., 274 U.S. 597, 603, 71 L.ed. 1224, 1228.

This Court has consistently held that it will not construe an act of the Congress as superseding State authority and jurisdiction unless the statute be clear and unequivocal on the point. Mr. Justice Jackson, speaking for this Court clearly reiterated these principles in the case of *Davies Warehouse Co. v. Bowles* (1944), 321 U.S. 144, 153-155, 88 L.ed. 635, 642-643:

> "Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent.
>
> • • • • • • •
>
> "At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. • • •
>
> "At least in the absence of congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation

when viewed against the background of our form of government."

In section 1(21)(a) of the Civil Aeronautics Act of 1938 (49 U.S.C.A. 401(21)(a)) Congress defined "interstate air transportation" so as to include "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce between * * * *places in the same State of the United States through air space over any place outside thereof.*" (Emphasis added.)

The term "State" as used in Section 1(21)(a) of the Civil Aeronautics Act (49 U.S.C.A. 401(21)(a)) need not be limited to the territorial boundaries of a state but may reasonably include its jurisdictional boundaries. Certainly the waters between the mainland of California and Santa Catalina are within the jurisdictional boundaries of the State of California. Such being the case, the route in question is not outside of the State of California and hence does not fall within the definition of "interstate air transportation" in the Civil Aeronautics Act.

Appellee air carriers in their statement in opposition to appellants' jurisdictional statement have referred to the legislative history of pertinent sections of the Civil Aeronautics Act. They quote from a letter dated July 31, 1935, from Joseph B. Eastman, Federal Coordinator of Transportation, to Senator Burton K. Wheeler, appearing in Volume 1 at page 68 of "U. S. Senate, Committee on Interstate Commerce, Hearings, 74th Congress," but omit one vital sentence. We add that sentence:

"Section 403(k), page 4: * * * It is suggested * * * that after the word 'through' in line 18 there be sub-

stituted for the words 'another State' the words 'the air space over any place outside thereof'. The latter change would include as interstate commerce transportation between points in the same State over a foreign country or the high seas as well as over another State. *There is the same need for regulation in the one case as in the other.*" (Emphasis added.)

What is the need for regulation when the flight is between points in California but over the State of Nevada? Neither California nor Nevada can effectively regulate the fares for such a flight. *Hanley v. Kansas City Southern Railway*, 187 U.S. 617, 620. Unless Congress provides for regulation there is no effective regulation.

In order for the same need to exist where the flight is over the high seas the flight must extend beyond the point where the flight is a matter of local concern only to the State of California. In other words it must extend not only beyond the geographical boundaries but the jurisdictional boundaries as well.

Suppose Mr. Eastman in his letter instead had said, "We prefer the broader definition since it will enable the Civil Aeronautics Authority to regulate certain rates which are now subject to regulation by the States because they are matters of local concern; for example, the rates for air transportation wholly between the mainland of California and Catalina Island." We submit that both the meaning of the definition and the reception of the proposal by the Congress would have been strikingly different.

Numerous bills have been presented to the Congress *which have sought to extend Federal economic regulation to intrastate operations of air carriers.*

In this connection we refer this Court to the legislative history of the following bills, none of which has been enacted:

78th Congress: Lea-Bailey Aviation Bill introduced as H.R. 1012 and S. 246; revised form of Lea-Bailey Aviation Bill, H.R. 3420; Boren Bill, H.R. 4845; Reece Bill, H.R. 4848.

79th Congress: Lea Bill, H.R. 674; Johnson Bill, S. 541; Lea Bill, H.R. 3383.

80th Congress: Wolverton Bill, H.R. 2337.

81st Congress: Brewster Bill, S. 423; Johnson Bill, S. 445; Johnson Bill, S. 2435.

A concise discussion of these bills and the opposition they met in the Congressional Committees will be found in the following reports of the proceedings of the National Association of Railroad and Utilities Commissioners:

1944 N.A.R.U.C. Proceedings 221
1945 N.A.R.U.C. Proceedings 299
1946 N.A.R.U.C. Proceedings 210
1947 N.A.R.U.C. Proceedings 128
1948 N.A.R.U.C. Proceedings 69
1949 N.A.R.U.C. Proceedings 166
1950 N.A.R.U.C. Proceedings 106

For a strong statement in support of the desirability of exclusive Federal regulation of all air navigation and air commerce we refer to the paragraphs appearing under the heading "Federal Jurisdiction" commencing

on page 8 of H.R. Report No. 784, on the Civil Aviation Bill, 78th Congress—H.R. 3420, submitted by Mr. Bulwinkle, from the House of Representatives Committee on Interstate and Foreign Commerce. This statement commences and reads as follows:

> "The inherent nature of aviation requires Federal regulation of all air navigation and air commerce. Such regulation is provided for in the bill".

We also quote from the Minority Views of same report at page 41:

> "The signers of these minority views do not agree with H.R. 3420, as reported by the Committee, because (1) it destroys States' rights, • • •
>
> "(b) The committee bill (by specific provisions hereinafter set forth) *takes away* (emphasis added) all rights of the States:
>
> "(1) *To regulate intrastate commerce by air,* including certificates, permits, rates, and all other matters normally subject to the State regulation of intrastate operations of public utilities."

As previously stated the minority views prevailed and the Congress did not *take away* the rights of the States. H.R. 3420 was never enacted into law.

We submit that through the enactment of the Civil Aeronautics Act the Congress intended to provide for the regulation of those rates of air carriers which could not be effectively regulated by the states. It did not intend to supersede effective state regulation.

As we have previously stated appellants contend that this Court should dispose of this case on the procedural

grounds which it has held to be of jurisdictional substance. However, if the merits are reached, we submit that the decision must nevertheless be in favor of appellants.

CONCLUSION.

For the procedural reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the Court below should be directed to dissolve the injunctions and to dismiss the complaints. If a judgment is rendered on the merits, the Court below should be directed to dissolve the injunctions and declare that the State Commission has jurisdiction to establish rates for transportation over the routes in question wholly between the mainland of California and Catalina Island.

Dated, San Francisco, California,
October 16, 1953.

EVERETT C. MCKEAGE,
Chief Counsel,
J. THOMASON PHELPS,
Senior Counsel,
WILSON E. CLINE,
Counsel for Appellants.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

Section 20 of Article XII of the California Constitution:

"No railroad or other transportation company shall raise any rate or charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances, whatsoever, except upon a showing before the railroad commission provided for in this Constitution, that such increase is justified, and the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property."

The first sentence of the second paragraph of Section 22 of Article XII of the California Constitution:

"Sec. 22. • • •

"Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. • • •"

Portions of Section 1 of Article XXI of the California Constitution of 1849:

"Section 1. The boundary of the State of California shall be as follows: . . . thence running west and along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence, running in a northwesterly direction and following the direction of the Pacific Coast, to the forty-second degree of north latitude; thence, on the line of said forty-second degree of north latitude, to the place of beginning. Also all the islands, harbors, and bays along and adjacent to the coast."

In 1879 the last sentence of Section 1 of Article XXI of the California Constitution was revised to read: "Also, including all islands, harbors, and bays along and adjacent to the coast."

Sections 170 and 171 of the California Government Code:

"170. *Declaration of boundary of State.* To give greater precision to the boundary of the State of California as defined in Article XXI of the Constitution, it is hereby declared that the part of the boundary which is described as 'running in a northwesterly direction and following the direction of the Pacific Coast to the forty-second degree of north latitude,' and as 'including all the islands, harbors, and bays along and adjacent to the coast,' runs and has in the past run three English nautical miles oceanward of lines drawn along the outer sides of the outermost of the islands, reefs and rocks along and adjacent to the mainland and across intervening waters; . . ."

"171. *Inland waters of State defined.* All waters between the mainland and the outermost of the islands,

reefs, and rocks along and adjacent to the coast of the State of California from which the boundary of the State is measured, and all waters between the islands, reefs and rocks themselves, are declared to be and to have been in the past inland waters of the State. Similarly, all waters within the lines around harbors and across bays, from which the boundary of the State is measured are declared to be and to have been in the past inland waters of the State. These waters are 'waters thereof' within the meaning of that phrase in Section 25 of Article I of the Constitution."

Sections 1701 through 1706, 1731, 1756 through 1767 and 2107 of the California Public Utilities Code:

"1701. All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

"1702. Complaint may be made by the commission on its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision

of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service.

"1703. All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties. In any review by the courts of orders or decisions of the commission the same rule shall apply with regard to the joinder of causes and parties as herein provided. The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.

"1704. Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the corporation or person complained of. Service in all hearings, investigations, and proceedings pending before the commission may be made upon any person upon whom a summons may be served in accordance with the provisions of the Code of Civil Procedure, and may be made personally or by mailing in a sealed envelope, registered, with postage prepaid. The commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof, not less than 10 days before the

time set for such hearing, unless the commission finds that public necessity requires that such hearing be held at an earlier date.

"1705. At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

"1706. A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review an order or decision of the commission, a transcript of such testimony,

together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for its judgment, such stipulation and the questions and the evidence therein specified shall constitute the record on review."

"1731. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing."

"1756. Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify

its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued.

"1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

"1758. The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article.

"1759. No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the per-

formance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

"1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

"1761. The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of the writ the Supreme Court in the manner provided in this article in its discretion may stay or suspend in whole or in part the operation of the commission's order or decision.

"1762. Except as provided in this section, no order staying or suspending an order or decision of the commission shall be made by the Supreme Court except upon five days' notice and after hearing. If the order or decision of the commission is stayed or suspended the order suspending it shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage, but the Supreme Court may grant a temporary stay restraining the operation of the commission order or decision at any time before such hearing and determination of the application for a stay when, in its opinion irreparable loss or damage would result to petitioner unless such temporary stay is granted.

Such temporary stay shall remain in force only until the hearing and determination of the application for a stay upon notice. The hearing of such application for a stay shall be given precedence and assigned for hearing at the earliest practicable day after the expiration of the notice.

"1763. No temporary stay shall be granted by the Supreme Court unless it clearly appears from specific facts shown by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and hearing had on a motion for a stay as provided in this article. Every such temporary stay shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it appears to be irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry not to exceed 10 days as the court may fix unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary stay is granted without notice the matter of the issuance of a stay shall be set down for hearing at the earliest possible time, and when it comes up for hearing the party obtaining the temporary stay shall proceed with the application for a stay and if he does not do so the court shall dissolve the temporary stay.

"1764. In case the order or decision of the commission is stayed or a temporay stay granted, the order of the court shall not become effective until a suspending bond is executed and filed with and approved by the court, payable to the people of the State of

California and sufficient in amount and security to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission and of all money which any person or corporation may be compelled to pay pending the review of the proceedings, for transportation, transmission, product, commodity, or service in excess of the charges fixed by the order or decision of the commission, in case such order or decision is sustained. The court, in case it stays or suspends the order or decision of the commission in any matter affecting rates or classifications, may also in its discretion direct the public utility affected to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court prescribes, all sums of money which it collects from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the commission had not been stayed or suspended.

"1765. In case the Supreme Court stays any order or decision denying to the utility an increase in any rate or classification, the court may condition such stay or temporary stay so as to permit petitioner to charge a higher rate pending the determination of the review and may attach other reasonable conditions to such stay or temporary stay.

"1766. In case the Supreme Court stays or suspends any order or decision lowering any rate or classification or stays any order or decision denying petitioner the right to charge an increased rate or classification and as a condition thereof permits the charging of

higher rates, the court shall require the public utility affected to keep such accounts, verified by oath as may, in the judgment of the court, suffice to show the amounts being charged or received by such public utility, pending the review, in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the order or decision of the commission is upheld. The court may from time to time require the petitioner to give additional security, or to increase the suspending bond, whenever, in its opinion such action is necessary to insure the prompt payment of the damages and overcharges. If the final decision by the Supreme Court upholds the commission's order or decision, all money which the public utility has collected pending the appeal in excess of that authorized by the order or decision of the commission, together with such interest as may be reasonable, shall be promptly paid to the corporations or persons entitled thereto in the manner prescribed by the court.

"1767. All actions and proceedings under this part and all actions or proceedings to which the commission or the people of the State of California are parties in which any question arises under this part, or under or concerning any order or decision of the commission, shall be preferred over, and shall be heard and determined in preference to, all other civil business except election causes, irrespective of position on the calendar. The same preference shall be granted upon application of the attorney of the commission in any action or proceeding in which he is allowed to intervene."

"2107. Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense."

Sections 1331, 1337, 1342, 2201 and 2281 of Title 28, United States Code:

"1331. The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

"1337. The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

"1342. The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

"(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

"(2) The order does not interfere with interstate commerce; and,

"(3) The order has been made after reasonable notice and hearing; and,

"(4) A plain, speedy and efficient remedy may be had in the courts of such State."

"2201. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

"2281. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Sections 1(2), 1(10), 1(21), 403, 404(a), and 404(b) of the Civil Aeronautics Act of 1938. (49 U.S.C.A. 401(2), 401(10), 401(21), 483, 484(a) and 484(b)):

"401(2). 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not

directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest."

"401(10). 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

"401(21). 'Interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

"(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

"(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

"(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

"483(a). Every air carrier and every foreign air carrier shall file with the Board, and print, and keep

open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

"(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the

Board to be specified in such tariffs, except those specified therein. Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees and their immediate families; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulation prescribe.

"(c) No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

"(d) Every air carrier or foreign air carrier shall keep currently on file with the Board, if the Board

so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates."

"484(a). It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

"(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 2(a)(2) and Section 4 of the Submerged Lands Act, Chapter 65, Public Law 31, 83rd Congress:

"Sec. 2. When used in this Act——

"(a) The term 'lands beneath navigable waters' means——

• • • • • • •

"(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles,

• • •

• • • • • • •

"Sec. 4. Seaward Boundaries.

——The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond the three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.'"

Appendix B

Commissioners
Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

Public Utilities Commission
State of California
August 6, 1951

File No. 360-1

Address All Communications to the Commission

California State Building
San Francisco 2, Calif.

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago 38, Illinois

Dear Mr. Dilworth:

We understand that the United Air Lines, Inc., is providing passenger transportation service by air for the public generally between Long Beach and Avalon, Santa Catalina Island.

A review of our official file fails to indicate that the United Air Lines have a tariff on file with this Commission which sets forth the fares, rules and charges applicable to the aforementioned California intrastate traffic.

It is requested that you inform this office as to what action United Air Lines contemplates taking in this matter.

Yours very truly,

(Sgd) Warren K. Brown

Director of Transportation

Letterhead of
United Air Lines

September 10, 1951

Mr. Warren K. Brown
Director of Transportation
Public Utilities Commission of
the State of California
California State Building
San Francisco 2, California

Re: Your File No. 360-1

Dear Mr. Brown:

Thank you for your kind consideration in sending to me a copy of your letter of August 6, 1951.

With particular reference to that letter, United Air Lines Inc. is providing air transportation for the carriage of persons and property between Los Angeles and Avalon and also between Long Beach and Avalon, in both directions.

We have on file with the Civil Aeronautics Board our tariffs covering the fares, rates and charges applicable to this service. Inasmuch as the Public Utilities Commission of the State of California does not have juris

diction over the regulation of this service, we have not filed a tariff with your Commission.

Very truly yours,

W. Delaney Dilworth
Traffic Manager

pss:ab
cc: John T. Lorch, Esq.
Oscar A. Trippetf, Esq.
Charles Stearns, Esq.
Paul Hebard—EXORD

Commissioners
Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

Public Utilities Commission
State of California

September 20, 1951

File No. 360-1

Address All Communications to the Commission

California State Building
San Francisco 2, Calif.

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago, Illinois

Dear Mr. Dilworth:

It has been brought to the attention of this Commission that United Air Lines is performing air transporta-

tion between Los Angeles, California, and Avalon, on Santa Catalina Island, and also between Long Beach, California, and Avalon, without having filed with this Commission its tariffs covering such transportation. It is our understanding that this operation is intrastate.

In your letter of September 10, 1951, to Mr. Brown, Director of Transportation of this Commission, you take the position that the Public Utilities Commission of California does not have jurisdiction over the service in question.

This is to inform you that this Commission does have jurisdiction over the service in question, it being intrastate, and the Supreme Court of this State has held that such service is subject to the jurisdiction of this Commission. Therefore, you are instructed to file with this Commission the tariffs covering the service in question.

Very truly yours,

(sgd) R. J. Pajalich

R. J. Pajalich, Secretary.

Letterhead of
United Air Lines

October 11, 1951

Mr. R. J. Pajalich, Secretary
Public Utilities Commission of
the State of California
California State Building
San Francisco 2, California

Subject: Letter of September 20, 1951
File No. 360-1

Dear Mr. Pajalich:

The matter of filing a tariff for our Catalina service with the Public Utilities Commission for the State of California was referred to our Law Department for their review. We have just been advised that their opinion will be available this week, and we plan to communicate with you as quickly as it is received.

Very truly yours,

W. Delaney Dilworth
Traffic Manager.

LGB:hk

Commissioners
Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

Public Utilities Commission
State of California
November 6, 1951

File No. 360-1

Address All Communications to the Commission

California State Building
San Francisco 2, Calif.

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago 38, Illinois

Dear Mr. Dilworth:

This refers to our exchange of letters regarding the filing of a tariff covering your service to Santa Catalina Island. Under date of October 11 you wrote us to the effect that the opinion of your law department in this matter would be available that week and you would communicate with us when it was received.

Can you now inform us what position you propose taking in this matter?

Yours very truly,

(Sgd) Warren K. Brown
Director of Transportation.

November 30, 1951

Mr. Warren K. Brown
Director of Transportation
Public Utilities Commission
State of California
California State Building
San Francisco 2, California

Re: File No. 360-1

Dear Mr. Brown:

This will acknowledge receipt of your letter of November 6, 1951, regarding our service to Santa Catalina Island.

This matter is now in the hands of our local counsel in Los Angeles and you will hear from them within the next few days.

Yours very truly,

W. D. Dilworth
Traffic Manager.

THD:ru

Trippet, Newcomer, Yoakum & Thomas
Lawyers
458 South Spring Street
Los Angeles 13
5 December 1951

Air Mail
Wilson E. Cline, Esq.
Assistant Counsel
Public Utilities Commission
State of California
California State Building
San Francisco 2, California

Re: File No. 360-1
(United Air Lines, Inc.)

Dear Mr. Cline:

You probably are aware of the fact that rather extended correspondence has been exchanged between the Public Utilities Commission and United with respect to that carrier's operation between Santa Catalina Island and the Los Angeles area. Such correspondence has been handled by Messrs. Brown and Pajalich on behalf of the Commission, and personnel in United's general office in Chicago. The question involved is whether or not United is required to file with your Commission tariffs covering the Catalina operation.

The matter has now been referred to us by our client for further handling, and since it concerns a question of law, it seemed appropriate to me that I should address this communication to you.

It is our position, of course, that United is not subject to the jurisdiction of your Commission with respect to

transportation furnished by it between Catalina and the mainland, for all of the reasons which we have heretofore advanced in connection with the Los Angeles-San Francisco air coach fare matter now on appeal to the Supreme Court of the United States. There is present in the Catalina situation an additional factor which, in our opinion, serves to remove any possible doubt with respect to the question. This is the fact that, while the termini of the route; i.e., Avalon and Long Beach-Los Angeles, are within the State of California, all but a small portion of the route traverses the high seas, an area which lies without the boundaries of the State of California (California Constitution Article XXI). Under such circumstance, the express language of the Civil Aeronautics Act establishes the fact of exclusive federal occupancy of the field of regulation (49 U.S.C. 401 (10), (20) and (21)). Ipso facto, this precludes the exercise of control by the state.

I trust that you will agree with the position taken by us, so that the problem may thereby be disposed of. In any event, I shall be pleased to hear from you on the matter.

Yours very truly,

Sgd. Charles Stearns,

of Trippet, Newcomer, Yoakum & Thomas.

CS/rg

(Seal)

PUBLIC UTILITIES COMMISSION
State of California

December 27, 1951

File No. 360-1

Address all Communications to the Commission

California State Building
San Francisco 2, Calif.

Mr. Charles Stearns, Esq.
Trippet, Newcomer, Yoakum & Thomas
458 South Spring Street
Los Angeles, California

Re: File No. 360-1
(United Air Lines, Inc.)

Dear Mr. Stearns:

Your letter of December 5 to Mr. Cline has been referred to this office for reply.

You, of course, are fully aware of the position which has been taken by the Commission with respect to intrastate fares of air carriers operating within the State of California, which position is now supported by decisions of the California Supreme Court.

You now contend that the route between Avalon and Long Beach-Los Angeles traverses the high seas and that state regulation is precluded by reason of the claimed exclusive Federal occupancy of this field of regulation. We have given the sections of the Civil Aeronautics Act to which you have referred us careful consideration. 49 U.S.C. 401(20) is not applicable as it relates to "air commerce". We interpret 49 U.S.C. 401(21) to define "inter-

state air transportation", "overseas air transportation", and "foreign air transportation" separately and not jointly.

Interstate air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in any state of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or *between places in the same State of the United States through the air space over any place outside thereof;* or between places in the same Territory or possession of the United States, or the District of Columbia.

Overseas air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States.

Foreign air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

The transportation of persons or property by air carrier between Avalon and Long Beach-Los Angeles is not inter-

state or foreign commerce in the general sense or in the Constitutional sense. See *Wilmington Transportation Company v. Railroad Commission,* (1913), 166 Cal. 741, affirmed (1915), 263 [236] U.S. 151, 56 [59] L. ed. 508. Conceding for the sake of argument that such transportation is overseas transportation in the general sense, Congress has not seen fit to include such transportation within its own definition of "overseas air transportation." The language "or between places in the same State of the United States through the air space over any place outside thereof" as used in the definition of "interstate air transportation" undoubtedly applies to transportation between places in the same state where the aircraft has gone through the air space over some other state. Hence the Congress has not occupied the field in so far as the local transportation by aircraft between Avalon and Long Beach-Los Angeles is concerned, and such transportation remains subject to regulation pursuant to the applicable provisions of the California Constitution.

In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct your client United Air Lines, Inc., to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles.

Very truly yours,

/s/ R. J. Pajalich,
Secretary.

Service of the within and receipt of a copy thereof is hereby admitted this _____ day of October, 1953.

_____

Attorney for United Airlines, Inc., and Catalina Air Transport.

_____

Attorney for Civil Aeronautics Board.